STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
V	No. 246772 Wayne Circuit Court
MICHAEL LEE ANTHONY, Defendant-Appellant.	LC No. 02-002184-01

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316, for the killing of Toya Lynn Hill and Tina Wallace. He was sentenced to life imprisonment with no possibility of parole. We affirm.

In January 2002, the victims' bodies were discovered in the basement of defendant's home. One victim was killed by manual strangulation, and the other died of asphyxiation after a plastic bag was placed over her head. One body was discovered in a back room and the other in a non-working freezer next to defendant's bed. The medical examiner estimated that the victims had been killed one to five months before the bodies were found.

I

Defendant argues that the other acts evidence offered by the prosecution was improperly admitted under MRE 404(b). We disagree. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The prosecution offered the other acts evidence to show that defendant employed a common scheme, pattern, or plan in committing the charged acts, which the prosecution argued tended to

establish both defendant's intent and modus operandi. The trial court ruled that the evidence was admissible "to show a scheme or plan . . . and the intent by the defendant."

A prosecutor who wishes to introduce other acts evidence must "offer the other bad acts evidence on something other than a character to conduct or propensity theory." *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). Moreover, while the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial," *Id*, the evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by consideration of undue delay, waste of time, or presentation of cumulative evidence." MRE 403. The trial court may, upon request, provide a limiting instruction to the jury. *Sabin (After Remand)*, *supra* at 56.

In Michigan, proof of a common plan, system, or scheme has been identified as an acceptable method of proving identity. *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982). And while not directly addressed by our Supreme Court, use of such evidence to prove intent is necessarily implied in *People v Engelman*, 434 Mich 204, 220; 453 NW2d 656 (1990) ("[i]f it could be shown in this case that defendant did indeed follow a common scheme or plan in committing such acts . . . , it would defy logic to limit the use of that evidence to proof of identity *or state of mind*." [emphasis added]).

"The decision whether . . . [404(b)] evidence will be admitted is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW 2d 785 (1998). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice, (On Remand)*, 235 Mich App 429, 439; 597 NW 2d 843 (1999). Furthermore, "[i]f an error is found, defendant has the burden of establishing that, more probably than not, a miscarriage of justice has occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW 2d 227 (2001).

Because defendant does not assert that the other acts evidence was offered for an improper purpose, and the trial court gave a limiting instruction when charging the jury, only the relevance and prejudice prongs of the other acts test are in issue.

"When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.'" *People v VanderVliet*, 444 Mich 52, 79-80; 508 NW2d 114 (1993), quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 23. However, when such evidence is offered to establish identity, "the trial court . . . should insist upon a showing of a high degree of similarity in the manner in which the crime in issue and the other crimes were committed." *Golochowicz, supra* at 325.

First-degree premeditated murder is a specific intent crime. *People v Garcia*, 398 Mich 250, 259; 247 NW2d 547 (1976). "It is well established in Michigan, as well as in most jurisdictions, that *all* elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *People v Mills*, 450 Mich 61, 69; 537 NW2d 909, mod 450 Mich 1212 (1995). Thus, defendant's specific intent was an element of the crime charged and was at issue in this case. Further, because there was no direct evidence that defendant had killed Hill and Wallace, the identity of their killer was also directly in issue. *Golochowicz, supra* at 318.

Defendant asserts that the trial court erred by permitting Laura Davis to testify about having been previously assaulted by defendant. We disagree. The evidence was that Davis had given defendant money and asked him to buy her crack cocaine, that defendant took the money, left the area and returned 10 minutes later. When defendant returned, he walked into the basement of his home without speaking to Davis. Davis followed defendant into the basement, and after defendant gave her the crack cocaine he attacked Davis by choking her. While certainly prejudicial, evidence of this incident involving Davis was sufficiently similar to the circumstances in the instant case to be probative of identity and intent. *Sabin (After Remand), supra* at 67. Moreover, the prejudicial effect of the evidence does not outweigh its probative value, particularly since the victim in the present case was asphyxiated and tested positive for cocaine. *Id*. Accordingly, the trial court did not abuse its discretion in admitting Davis' testimony.

Defendant next asserts that the trial court erred in admitting other acts testimony by Freezell Jones, Rochelle Willis, Donna Lewis, Brenda Johnson, and Tonya Jordan. We agree. Jones testified that he witnessed defendant in an altercation with a woman, during which he saw defendant pull the woman into his basement. The woman was not either of the victims in this case, and Jones could not say what happened, if anything, to the woman after she was pulled into the basement. Willis testified that in 1990, while walking her home, defendant attacked her with a hammer. Lewis testified she has seen defendant grab women in an aggressive manner and "rape" them with his conversation and look. Johnson testified that defendant had made sexual advances to her. Jordan testified that defendant acted in an aggressive manner when he was smoking crack, and that she had once observed him hold a hatchet and a hammer in a paranoid fashion. We agree that this evidence is substantially dissimilar from the facts of this case, such that its marginal probative value (if any) is substantially outweighed by the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Nevertheless, in light of the overwhelming weight of the properly admitted evidence, including Davis' testimony, we conclude that the erroneous admission of this other acts evidence was harmless. *Knapp, supra* at 361.

II

Defendant also argues that the evidence was insufficient to establish the premeditation and deliberation required for a first-degree murder conviction. We disagree. We review insufficiency of evidence claims "in a light most favorable to the prosecution . . . and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

"To premeditate is to think beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Morrin*, 31 Mich App 301, 329; 187 NW2d 434 (1971). "Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and, (4) the defendant's conduct after the homicide." *People v Schollaert*, 194 Mich App 170; 486 NW2d 312 (1992).

While Davis' testimony does not provide direct evidence that defendant planned either of the killings at issue, evidence that defendant used a plan or system to lure women to his basement with drugs in order to strangle them is also evidence that the strangulations were not

done in the heat of passion. The existence of a preconceived design supposes the situation where the intent to kill a particular individual is formulated "only as a conclusion of prior premeditation and deliberation." LaFave & Scott, Criminal Law (Hornbook Series, 1986), § 7.7(a), p 643. In such a situation, even if the act of killing follows immediately after the specific intent is formed, the existence of cool reflection is presumed in the prior development of a modus operandi. Thus, a reasonable trier of fact could conclude from the Davis' testimony that defendant formulated a plan or scheme to lure his victims to the basement prior to encountering Hill and Wallace, and in turn to infer from the existence of this plan the requisite premeditation and deliberation.

In addition, the manner in which defendant killed the victims also provides evidence of premeditation and deliberation. Both victims died of asphyxiation, a method that requires several minutes between initiation of the act and the victim's death, giving defendant an opportunity to have considered what he was doing. "While neither the brutal nature of a killing nor manual strangulation alone is sufficient to show premeditation, . . . evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look'." *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999).

Finally, defendant took some effort to conceal the victims' bodies after he killed them. One victim was left in a back room covered with a blanket and the other was placed in a chest freezer and covered with defendant's clothing. A defendant's attempts to conceal his crime can also be evidence of premeditation. *Id.*

Accordingly, Davis' testimony, evidence regarding how Hill and Wallace were killed, and evidence of defendant's attempts to conceal the bodies was sufficient evidence from which the jury could have found the requisite premeditation and deliberation.

III

Finally, defendant argues that the court's failure to instruct the jury that first-degree murder is a specific intent crime was error. Specifically, defendant argues that the failure to give such an instruction effectively blurred the distinction between first-degree and second-degree murder to such an extent that, at best, confused the jury, or, at worst, allowed for conviction based on the wrong intent. Because defendant did not object to the jury instructions at trial, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999).

"It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." *People v Duncan*, 462 Mich 47, 48; 610 NW2d 551 (2000). However, "instructional error regarding one element of a crime, whether by misdescription or omission is subject to a harmless error analysis." *Id.* at 54.

Looking at the instructions as a whole, we see no error requiring reversal. The jury was instructed that in order to prove that defendant was guilty of first-degree premeditated murder, the prosecution needed to prove that defendant "intended to kill the decedent." Further, the jury was properly instructed on the elements of premeditation, deliberation, and on the required states of mind to prove second-degree murder. There was no blurring or blending of the instructions

for the two crimes, *People v Dykhouse*, 418 Mich 488, 512; 345 NW2d 150 (1984), nor was there any indication from the jury that they were confused about the difference between the two, see *People v Beaudin*, 417 Mich 570, 574; 339 NW2d 461 (1983).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder